Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October Term, 2001

LESTER R. HARRIS,
CORPORAL, UNITED STATES MARINE CORPS
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 842(h) applies to the purely local, intrastate possession and storage of stolen explosives, in light of *United States v. Lopez*, 514 U.S. 549 (1995), and *Jones v. United States*, 529 U.S. 848 (2000); and if so, whether it applies to Petitioner's possession and storage of an explosive in his home.

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PETITION FOR A WRIT OF CERTIORARI

Corporal Lester R. Harris, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Harris*, 56 M.J. 480 (2002), is located in Appendix A at 1a-8a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix B at 9a-16a.

JURISDICTION

The lower court granted review of Petitioner Harris's case and affirmed his conviction for possessing and storing an explosive, conspiracy to wrongfully dispose of government property, dereliction of duty in failing to report an offense, and wrongful disposition of government property on June 19, 2002. He invokes this Court's jurisdiction under 28 U.S.C. § 1259(3) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, section 8, clause 3, of the United States Constitution states:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

Title 18 U.S.C. § 842(h) (2000) states:

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

STATEMENT OF THE CASE

1. In early March 1998, Petitioner Harris and other Marines from his company participated in a field exercise using M112 Demolition Charge C-4 explosives at Marine Corps Base, Hawaii. R. at 27. During the exercise, Corporal David A. Tucker, United States Marine Corps, stole 1.25 pounds of C-4. R. at 27. Harris was not involved in the theft. R. at 27.

During the end of May or early June 1998, Lance Corporal Daniel L. Matyniak, United States Marine Corps, brought the C-4 to Harris's on-base home. R. at 24. Matyniak had been keeping the C-4 in his on-base barracks, but was worried it might be discovered during an inspection. R. at 24. Petitioner Harris permitted Matyniak to bring the C-4 into his home and store the stolen C-4 in a hallway closet. R. at 24-25.

Around June 16, 1998, Private First Class Anthony Quiroz, USMC, gave Harris a ride home from work. R. at 24, 31. When they arrived at Harris's house, Quiroz went in to use the phone. R. at 24, 31. Harris told Quiroz he had the stolen C-4 in his closet, and told him he wanted "to get rid of it." R. at 24, 31. Harris asked Quiroz if he wanted the C-4, and Quiroz agreed to take it. R. at 31. Harris did not know what Quiroz planned to do with the C-4, and only later learned from the Naval Criminal Investigative Service that Quiroz tried to sell the C-4 to an undercover agent. R. at 33.

Petitioner Harris was tried by a general court-martial, military judge alone, on September 2, 1998. Consistent with his pleas, the judge found him guilty of possessing, transporting, and storing explosive material in violation of 18 U.S.C. § 842(h) (2000). He was also found guilty, consistent

with his pleas, of conspiracy to wrongfully dispose of government property, dereliction of duty in failing to report an offense, and wrongful disposition of government property, in violation of Articles 81, 92, and 108 of the Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 908 (2000).

The military judge sentenced Harris to confinement for ten years, reduction in rank to the lowest enlisted paygrade, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the discharge, ordered the sentence executed. Pursuant to a pretrial agreement, the convening authority suspended execution of confinement in excess of forty-nine months for a period of twelve months.

2. On appeal before the United States Navy-Marine Corps Court of Criminal Appeals, Harris challenged the constitutionality of 10 U.S.C. § 842(h), and raised several other issues unrelated to this petition.

The Navy-Marine Corps Court of Appeals affirmed the findings as to the Article 81, 92, and 108, UCMJ, violations. *United States v. Harris*, No. 20000354, slip op. at 6 (N-M. Ct. Crim. App. Nov. 29, 2000). The court affirmed the findings as to the violation of 18 U.S.C. § 842(h) but excepted the word "transporting" from the finding. *Id.* The lower Court believed Harris's mere possession of C-4 in his home did not support a finding that he transported the C-4. The court found Harris's sentence inappropriately severe. *Id.* at 4. The lower court reassessed the sentence and only approved confinement for forty-two months, forfeiture of all pay and allowances, reduction to the lowest enlisted paygrade, and a dishonorable discharge. *Id.* at 6. The court refused to find unconstitutional Congress's regulation of the mere possession and storage of an explosive under 18 U.S.C. § 842(h).

3. Harris appealed his affirmance to the United States Court of Appeals for the Armed Forces. Specifically, he petitioned the court to review the convening authority's consideration of prejudicial documents during his post-trial action, and to review Congress's authority under the Commerce Clause to criminalize possession and storage of a stolen explosive. The Court of Appeals for the Armed Forces granted review of Harris's case, but only addressed the issue related to the convening authority's post-trial action. The court found the convening authority's action proper and affirmed Harris's conviction and sentence. *United States v. Harris*, 56 M.J. 480 (2002).

REASONS TO GRANT THE PETITION

Congress's attempt to regulate conduct such as Petitioner Harris's is an unconstitutional expansion of its power under the Commerce Clause. "Under our federal system the 'States possess primary authority for defining and enforcing the criminal law.' " *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). *Cf. United States v. Morrison*, 529 U.S. 598 (2000) (holding Congress exceeded its authority under the Commerce Clause in providing a federal civil remedy for victims of gender-motivated violence).

1. In *Lopez*, this Court held a federal criminal statute similar to 18 U.S.C § 842(h) to be unconstitutional. *Lopez*, 514 U.S. at 558. At issue in *Lopez* was the Gun-Free School Zones Act of 1990 ("the Act"), which prohibited possession of firearms within designated school zones. This Court held that Congress overstepped its authority under the Commerce Clause because the Act did not regulate the use of channels of interstate commerce, the instrumentalities of interstate

commerce, or those activities that substantially affect interstate commerce. *Id.* at 558-59. Thus, the Act could not be sustained as a regulation "of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 560. This Court also held the Act to be unconstitutional in part because it lacked a "jurisdictional element" to ensure that on a case-by-case basis the firearm in question affected interstate commerce. *Id.* at 561.

2. In *Jones v. United States*, 529 U.S. 848 (2000), this Court reiterated that Congress may not render "'traditionally local criminal conduct' . . . 'a matter for federal enforcement.' " *Jones*, 529 U.S. at 858 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). This Court held in *Jones* that the federal arson statute, 18 U.S.C. § 844(i), does not cover the arson of a private, owner-occupied dwelling, but only covers property "currently used in commerce or in an activity affecting commerce." *Jones*, 529 U.S. at 859.

The government had argued that a private owner-occupied residence affected interstate commerce, and was therefore covered by a federal criminal statute, because the home was used as collateral to secure a mortgage and casualty insurance from an out-of-state lender and insurer. *Id.* at 855. The government also argued that the home was heated by natural gas that came from a different state. *Id.* This Court rejected the government's arguments, stating that if the government's expansive position were accepted, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. This Court cautioned that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* at 858 (quoting *Bass*, 404 U.S. at 349).

3. In Petitioner Harris's case, Congress criminalized the possession and storage of stolen explosives under 18 U.S.C. § 842(h). Congress's regulation of such non-commercial, purely local activity, traditionally left to the states to regulate, is unconstitutional under this Court's analyses in *Lopez* and *Jones*. First, 18 U.S.C. § 842(h) does not regulate the use of the channels of interstate commerce. *See Lopez*, 514 U.S. at 558. Second, it does not regulate the instrumentalities of interstate commerce. *Id.* Third, mere possession of an explosive in one's house, similar to possession of a firearm in a school zone, does not arise out of and is not connected to commercial transactions, and does not substantially affect interstate commerce. *Id.*

Unlike the Gun Free School Zones Act of 1990, 18 U.S.C. § 842(h) does contain a purported jurisdictional element. The statute prohibits possession of "any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen . . ." 18 U.S.C. § 842(h).[1] However, even if a statute prohibiting possession of contraband has a purported jurisdictional element, this Court has still required a nexus between the prohibited conduct and interstate commerce. *Lopez*, 514 U.S. at 561-62 (citing *United States v. Bass*, 404 U.S. 336 (1971)); *but cf. United States v. Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996) (upholding constitutionality of 18 U.S.C. § 842(i)(1) which makes it unlawful for a *felon* to "possess any explosive which has been shipped or transported in interstate. . . commerce"). The nexus must be more than the mere fact that the contraband traveled in interstate commerce at some point in

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[1] Congress amended section 842(h) in 1996 to add the jurisdictional element.

time. *Lopez*, 514 U.S. at 561-62. In *Lopez*, for example, there was no question that the gun possessed in the school zone had at some point in time traveled in interstate commerce. The required nexus is that the proscribed activity "substantially affects" interstate commerce. *Id.* Mere possession of a gun in a school zone lacked the required nexus because it had no substantial effect on interstate commerce. *Id.*

Likewise, possession and storage of an explosive in one's private home does not "substantially affect" interstate commerce, any more than does possession of a gun in a school zone. Petitioner's home was not used in commerce or in an activity affecting commerce. Accordingly, there was no nexus between Petitioner Harris's conduct and interstate commerce. Congress's purported jurisdictional element is nothing more than an attempt by Congress to expand its commerce power over noncommercial activity.

4. Congress overstepped its authority under the Commerce Clause by criminalizing the purely local possession and storage of a stolen explosive under 18 U.S.C. § 842(h). Congress asserted its authority over such local activity by including in 18 U.S.C. § 842(h) a jurisdictional element limiting the scope of the statute to explosives that have traveled in interstate commerce. This Court should not permit Congress to include a sham jurisdictional element in a criminal statute merely to expand its authority under the Commerce Clause. To do so could result in Congress's criminalization of the possession of virtually any object, so long as it had traveled in interstate commerce. Affirming Petitioner's conviction under 18 U.S.C. § 842(h) would stand squarely against this Court's decisions in *Jones v. United States*, 529 U.S. 848 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 2002

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 01-0226

Crim. App. No. 2000-0354

Lester R. HARRIS, Corporal
U.S. Marine Corps, *Appellant*

v.

United States, *Appellee*

BAKER, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE and EFFRON, JJ., and SULLIVAN, S.J., joined.

For Appellant: *Lieutenant Glenn Gerding*, JAGC, USNR (argued).
For Appellee: *Lieutenant R. W. Weiland*, JAGC, USNR (argued); *Commander P.A. Dutton*, JAGC, USN (on brief); *Colonel Marc W. Fisher, Jr.*, USMC, and *Lieutenant James E. Grimes*, JAGC, USNR.

Judge BAKER delivered the opinion of the Court.

A military judge sitting as a general court-martial tried appellant. In accordance with his pleas, he was found guilty of conspiracy to wrongfully dispose of M112 Demolition Charge (C-4), dereliction of duty in failing to report to appropriate authorities the known location of the stolen C-4,

wrongful disposition of these explosives, and a violation of 18 USC § 842(h), by unlawfully possessing, transporting, and/or storing the C-4, in violation of Articles 81, 92, 108, and 134, Uniform Code of Military Justice, 10 USC §§ 881, 892, 908, and 934, respectively. Appellant was sentenced to a dishonorable discharge, confinement for ten years, total forfeitures, and reduction to pay grade E-1. The convening authority approved the adjudged sentence and, except for the punitive discharge, ordered it executed. However, in compliance with a pretrial agreement, he suspended all confinement in excess of forty-nine months for a period of twelve months from the date of his final action.

The Court of Criminal Appeals affirmed the findings in an unpublished opinion. However, in connection with appellant's conviction for violating 18 USC § 842(h), it excepted the word "transporting" from the specification. The court also ruled that appellant's sentence was inappropriately severe and reassessed. Upon reassessment, the court reduced appellant's confinement to forty-two months.

This Court granted review of the following issue:

> WHETHER APPELLANT'S SUBSTANTIVE RIGHTS WERE MATERIALLY PREJUDICED BY THE CONVENING AUTHORITY'S FAILURE TO GIVE HIM NOTICE OF AND AN OPPORTUNITY TO REBUT ADVERSE PREENLISTMENT JUVENILE MATTERS FROM OUTSIDE THE RECORD, THAT THE CONVENING AUTHORITY CONSIDERED BEFORE TAKING ACTION ON APPELLANT'S CASE.

Appellant complains on appeal that the convening authority improperly considered certain matters contained in

his service record prior to taking action under RCM 1107, Manual for Courts-Martial, United States (2000 ed.).[1] We resolve this issue against appellant and affirm.

Discussion

During post-trial review, the convening authority stated in his final action, "I considered the Staff Judge Advocate's recommendation, record of trial, the Service Record Book [SRB] of Corporal Lester R. Harris, and the matters submitted by the defense pursuant to R.C.M. 1105, MCM, 1995." As appellant's brief states, his "SRB contained three pages documenting criminal offenses that he committed before he enlisted in the Marine Corps, many of which he committed while a juvenile." Final Brief at 4. Specifically, the SRB contained a one-page form titled "Request for Waiver of Enlistment Criteria," from the Commanding Officer, United States Marine Corps Recruiting Station, Dallas, to the Commanding General, Marine Corps Recruit Depot, San Diego. This document includes blocks for "Drug" use and "Offenses," including space to record the nature and disposition of such offenses. Included with this form is a two-page document with the following heading: "Subj: Request for Waiver Case of Harris, Lester R." This latter document provides in narrative form, inter alia, background on appellant's use of marijuana, LSD, and cocaine prior to enlistment, some of which occurred while appellant was a juvenile. Appellant's submissions pursuant to RCM 1105, Manual, *supra*, did not address these SRB entries.[2]

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[1] All Manual provisions cited in this opinion are identical to the ones in effect at the time of appellant's court-martial.

[2] These pages, along with other entries from appellant's SRB, were submitted by the Government to the Court of Criminal Appeals for inclusion in the appellate record.

Appellant first argues that the documents do not fall within the matters delineated within the meaning of RCM 1107 that the convening authority may consider without giving appellant an opportunity to respond. RCM 1107(b)(3) provides:

> Matters considered.
>
> (A) Required matters. Before taking action, the convening authority shall consider:
>
> (i) The result of trial;
>
> (ii) The recommendation of the staff judge advocate or legal officer under RCM 1106, if applicable; and
>
> (iii) Any matters submitted by the accused under RCM 1105 or, if applicable, RCM 1106(f).
>
> (B) Additional matters. Before taking action the convening authority may consider:
>
> (i) The record of trial;
>
> (ii) The personnel records of the accused; and
>
> (iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable,

> the accused shall be notified and given an opportunity to rebut.

Appellant asserts that RCM 1107 does not define the term "personnel record," but that the term is defined in RCM 1001(b)(2). According to appellant, since the documents in issue fail to meet the definition in RCM 1001(b)(2),[3] they cannot be considered personnel records for the purposes of RCM 1107. Appellant also argues that while these documents were, as a matter of fact, in his SRB, they are not personnel records kept in accordance with service regulations and, thus, were improperly contained in his service record. Therefore, he should not be charged with knowledge of the documents' presence in his SRB. In either case, he contends, since the documents were not personnel records properly considered by the convening authority, they were "other matters" for which the convening authority was obligated to give him notice under RCM 1107(b)(3)(B)(iii). Finally, appellant argues that once a servicemember qualifies for enlistment, his past misdeeds should not be held against him. He should start with a clean slate, especially when those misdeeds were committed as a juvenile.

The problem with appellant's argument regarding RCM 1001(b)(2) and RCM 1107 is that the Waiver of Enlistment Criteria, as appellant notes, *was* part of his SRB, which *is* a repository of appellant's personnel records and *was* something to which appellant had access. Further, Rule 1001(b)(2) is a rule of admissibility intended to regulate the type of evidence submitted by counsel as part of the adversarial process during the presentencing hearing, not as

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[3] This provision states: "'Personnel records of the accused' includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." (Emphasis added.)

part of the post-trial action by the convening authority.[4] Rule 1107(b)(3) provides the convening authority with broad discretion as to which matters to consider prior to acting on a case. Rule 1107(b)(3) also provides the accused with constructive notice of the matters that must and may be considered by the convening authority, such as "personnel records of the accused." RCM 1107(b)(3)(B)(iii) requires actual notice only "if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable . . . ."

Both parties agree that the relevant regulation is Marine Corps Order P1070.12, Individual Records Administration Manual (known to Marines by its short title "IRAM"), of which we take judicial notice in this circumstance. *See United States v. Mead*, 16 MJ 270, 273 (CMA 1983). "The IRAM publishes policies, procedures, and technical instructions *for the administration of personnel records*." IRAM at para. 0001 (emphasis added). The IRAM "is issued for the guidance and compliance of all individuals concerned *in any aspect of Marine Corps personnel records administration*." Marine Corps Order P1070.12J (May 16, 1998) (emphasis added). Chapter 4 of the IRAM is titled "Service Record Book (SRB)." Based on the foregoing, it is beyond peradventure that the SRB is a repository of "personnel records."

Appellant anticipates this conclusion in arguing that the presence of the enlistment waiver in his SRB is not controlling because the waiver was maintained in appellant's SRB contrary to service regulations. Therefore, it was not

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[4] Even if the second paragraph of RCM 1001(b)(2) were viewed as a definition of "personnel record" applicable to RCM 1107, the plain text of the paragraph is inclusive rather than exhaustive as to the meaning of "personnel record."

itself a "personnel record." Chapter 4 of the IRAM arguably suggests otherwise. Paragraph 4000 anticipates the inclusion of preenlistment information, stating: "The SRB is designed for recording specified information about a Marine *at the time of enlistment*." (Emphasis added.) Paragraph 4001(c)(2)(48) of the regulation states that the following documents are to be inserted in the SRB, if applicable: "Any special authority for enlistment/reenlistment or extension." However, we need not ultimately determine the scope of these provisions. Appellant has not carried his burden of demonstrating before this Court that the enlistment waiver documents maintained in his service record do not constitute "special authority" within the meaning of subparagraph (48). Therefore, we need not decide today whether a document improperly maintained in an accused's SRB may be considered.[5]

Conclusion

The documents were part of appellant's SRB, a repository of an enlisted Marine's personnel records. Appellant had a right to review his SRB and address any potentially adverse information contained in the SRB as part of his clemency petition. *See* IRAM at para. 4001.3 ("When Marines desire to examine their SRB, they may do so. . . ."). Therefore, appellant was "chargeable" with knowledge of the contents of his SRB and was on notice, pursuant to RCM 1107(b)(3)(B), that the enlistment waiver documents could be considered by the convening authority. Under these circumstances, the convening authority properly considered the enlistment waiver documents in the SRB prior to his

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[5] Appellant's argument that preenlistment and juvenile conduct should not be held against him is a prudential argument founded on policy considerations rather than legal dictates. It is also an argument that can appropriately be made as part of an RCM 1105 submission.

action and was not obligated to further notify appellant that he would do so.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

W.A. DeCICCO D.A. ANDERSON
C.A. PRICE

UNITED STATES

v.

Lester R. HARRIS
Corporal (E-4), U.S. Marine Corps

NMCM 200000354 Decided 28 November 2000

Sentence adjudged 11 September 1998. Military Judge: W.P. Hollerich. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

LT GLENN GERDING, JAGC, USNR, Appellate Defense Counsel
LT JAMES E. GRIMES, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of conspiracy to wrongfully dispose of M112 Demolition Charge (C-4), dereliction of duty by failing to report to appropriate authorities the known location of the stolen C-4, wrongful disposition of C-4, and violation of 18 U.S.C. § 842(h), by unlawfully possessing, transporting and/or storing the stolen C-4 in violation of Articles 81, 92, 108, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 908, and 934. He sentenced the appellant to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence. However, under the terms of the pretrial agreement, he suspended confinement in excess of 49 months for a period of 12 months from the date of his action.

We have reviewed the record of trial, the appellant's eight assignments of error, and the Government's response. Except as noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. We discuss below the assignments of error that warrant comment. The remaining assignments of error have been considered and are found to be without merit.

Unreasonable Multiplication of Charges

In his first assignment of error the appellant argues, citing our decision in *United States v. Quiroz*, 52 M.J. 510, 513 (N.M.Ct.Crim.App. 1999), that Charge III (wrongfully disposing of the C-4 by delivering) and Charge V (violation of 18 U.S.C. § 842(h) by possessing, transporting, and/or storing the C-4), constitute an unreasonable multiplication of charges.

During the providence inquiry, the appellant explained to the military judge how he came into possession of the stolen C-4 from LCpl Matyniak. LCpl Matyniak left it at the appellant's house because he feared a health and comfort inspection. Record at 24. The appellant kept the C-4 on a shelf in his closet for about a week. Then the appellant's wife asked him to get rid of the C-4. The appellant then asked PFC Quiroz to take the C-4 and he agreed.

The appellant now argues that he was convicted twice of the same act because the wrongful disposition of the C-4 in Charge III was accomplished by "delivering" it to PFC Quiroz the same act that fulfills the "transporting" in Charge V. Appellant's Brief of 5 Jun 2000 at 6. We disagree. We find that the factual basis for Charge V was the acceptance of the C-4 by the appellant and the consequent possession and storing and not the delivery to PFC Quiroz. The Title 18 violation was completed by the storing and possession. The wrongful disposition of the C-4 is a separate and distinct offense and is not a duplication of Charge V. We therefore conclude that the appellant is not entitled to the relief we afforded PFC Quiroz. *See United States v. Quiroz*, 53 M.J. 6000 (N.M.Ct.Crim.App. 2000)(*en banc*)(*petition for review filed*, 53 M.J. 256); *United States v. Matyniak*, No. 9900937 (N.M.C.Ct.Crim.App. 23 March 2000).

However, after careful consideration of all the evidence in the record, especially the appellant's statements during the providence inquiry, we do not find that the appellant "transported" the C-4 as alleged in Charge V. "Transport" is defined as to carry from one place to another. *The American Heritage Dictionary* (1982) at p. 1288. The appellant did not carry the C-4 from one place to another. He simply took the C-4 from his closet and gave it to PFC Quiroz while Quiroz was visiting at the appellant's house. We do not consider this action to be "transporting" the C-4. We therefore find a substantial basis to reject his guilty plea to this offense in part. *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). We will correct this finding in our decretal paragraph.

Sentences Disparity and Appropriateness

The appellant next contends that his sentence is inappropriately severe because it is highly disparate from the sentences received by LCpl Matyniak and PFC Quiroz. The appellant was sentenced to confinement for 10 years and a dishonorable discharge. LCpl Matyniak was sentenced to 30 months confinement and a bad-conduct discharge. PFC Quiroz, who sold the C-4, was sentenced to confinement for 10 years and a dishonorable discharge. All three Marines were convicted of violations of 18 U.S.C. § 842(h) and of similar conspiracies involving the same C-4. We also note that the appellant was a noncommissioned officer.

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 10 C.M.A. 102, 106-107, 27 C.M.R. 176, 180-181 (1959)). In raising the issue of sentence disparity, the

appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *United States v. Lacy*, 50 M.J. 286, 288 (1999); *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise form a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Applying these criteria, and considering all the circumstances, we find that the appellant has met his burden of demonstrating that his case is closely related to those of LCpl Matyniak and PFC Quiroz.

We must next examine whether the appellant's sentence and those of LCpl Matyniack and PFC Quiroz are "highly disparate". We do not find the appellant's sentence to be highly disparate with that of LCpl Matyniack or PFC Quiroz. Quiroz and the appellant received the same amount of confinement. Quiroz committed more serious offenses (including the manufacture of marijuana and sale of C-4). However, the appellant was a noncommissioned officer and thus was invested with greater responsibility and authority than LCpl Matyniak and PFC Quiroz; he solicited a subordinate to engage in misconduct; he also had prior disciplinary history that LCpl Matyniak did not have. The appellant raises a good point that he did not try to sell the C-4 as PFC Quiroz did, yet they received the same sentences. However, the appellant was convicted of dereliction of duty by failing to report the stolen C-4. The appellant was in a position of trust as an NCO. He should have set an example for his subordinates. Instead, he concealed and solicited their involvement in misconduct. After reviewing the record, we do not find the appellant's conduct to be less egregious than any of the other co-accuseds.

Even if the sentences were highly disparate, the appellant may only be entitled to relief if the Government cannot demonstrate "a rational basis for the disparity," *Lacy*, 50 M.J. at 288, or, provide "good and cogent reasons" for the disparity. *Kelly*, 40 M.J. at 570. After reviewing all the evidence and for the reasons stated above, we find a rational basis or good and cogent reasons for the disparity in this case.

Although we find no basis to provide relief on the basis of sentence disparity, after carefully considering all the evidence in the record, including the appellant's military record and character letters, we find that the appellant's sentence is inappropriately severe. Art. 66(c), U.C.M.J. We will grant relief in our decretal paragraph.

Providence of Guilty Plea to 18 U.S.C. § 842(h)

The appellant next asserts that his guilty plea to possessing, transporting and/or storing C-4 in violation of 18 U.S.C. §842(h), is improvident because he did not personally know that the C-4 had traveled in interstate commerce. We find no merit in this argument. *United States v. Solis*, 46 M.J. 31 (1997); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Morris*, 47 M.J. 695 (N.M.Ct.Crim.App. 1997). An accused need not have personal knowledge of all the facts necessary to establish a factual basis for the plea. An accused must only be convinced and be able to explain all the facts necessary to establish guilt. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion; *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). At trial the appellant admitted that the C-4 had to have traveled in interstate commerce because it was not manufactured in Hawaii. Even though he had no personal

knowledge of this fact, his admission satisfied this element of the offense. We find no substantial basis in law and fact to reject the guilty plea on this basis. *Prater*, 32 M.J. at 436.

Improper Sentencing Argument

The appellant claims that the trial counsel committed prosecutorial misconduct and plain error when he argued that the C-4 the appellant handled "could have been detonated" in places like Beirut, the World Trade Center, Oklahoma City, and Kenya. R. at 69. The appellant's defense counsel did not object to these comments. The Government concedes that this was an obvious error but claims there was no prejudice. Government Reply Brief of 4 August 2000 at 12. We agree. It is improper for counsel to seek to inflame the passions of the court members. *United States v.* Baer, 53 M.J. 235, 237 (2000); *United States v. Clifton,* 15 M.J. 26, 30 (C.M.A. 1986); *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976). Counsel's argument in that respect was improper. However, we do not find prejudice. This was a military judge alone trial and military judges are presumed to know and follow the law. *See United States v. Raya*, 45 M.J. 251, 253 (1996); *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994). Therefore, this error is without merit.

Deficiency of the Staff Judge Advocate's Recommendation

In his seventh assignment of error the appellant claims that the Staff Judge Advocate's Recommendation [SJAR] is fatally deficient where it misstates the appellant's length of service, prior re-enlistment, and character of service. He asks that we set aside the convening authority's [CA] action and order a new SJAR and CA action. We decline to grant the relief requested.

Even though the error occurred, the appellant did not object to it when the opportunity was presented to him below. Thus, while there is failure to comply with R.C.M. 1106(d)(3)(C), in the absence of plain error, the defect is waived. R.C.M. 1106(f)(6). We find no plain error because the appellant cannot demonstrate that he was prejudiced. *See United States v. Wheelus*, 49 M.J. 283, 288. The CA stated that he had considered the record of trial and the service record book prior to taking his action. Therefore, we find no prejudice. The error was harmless and no relief is warranted.

Conclusion

Accordingly, the findings as to Charges I, II, and III are affirmed. We affirm the findings as to Charge V excepting the word "transporting". We have reassessed the sentence in accordance with the principles in *United States v. Cook*, 48 M.J. 434, 438 (1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment of the sentence, and considering our determination that the adjudged sentence was inappropriately severe, we approve only so much of the sentence as extends to confinement for 42 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

For the Court

R.H. TROIDL
Clerk of Court